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Supreme Court of the United States

OCTOBER TERM, 1906

No. 191

CLARENCE A. BRANDENBURG, PLAINTIFF-IN-ERROR,

vs.

DISTRICT OF COLUMBIA

BRIEF FOR THE DEFENDANT

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STATEMENT OF THE CASE.

This case is the first of two cases, in point of time, brought to set aside certain assessments made on lots 42 and 43, square 69, for the opening of a minor street, known as "Newport Place" in said square.

The petition alleges that the Commissioners, acting under the authority of the act of July 22, 1892, and the amendment thereto of August 24, 1894, opened a minor street in said square, and assessed benefits against the said lots, of which the appellant is the owner, exceeding the damages occasioned by the taking of the land condemned.

The act of July 22, 1892, is as follows:

"*Be it enacted, etc.* That the Commissioners of the District of Columbia be, and they are hereby, authorized to condemn, open, extend, widen, or straighten alleys in the District of Columbia upon the presentation to them of the plat of the alley to be condemned, opened, widened, extended, or straightened, accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, widened, extended, or straightened, or when the Commissioners of the District of Columbia shall certify that the preservation of peace, good order, and public morals require any such alley shall be opened, extended, widened or straightened, or when the Health Officer of said District shall certify that such opening, extension, widening, or straightening of an alley is necessary for the public health; provided, that in the opening, extension, widening or straightening of an alley, the fee of which is in the United States which may thereby become useless or unnecessary; and it shall also, in like manner, be lawful to close any other alleys or parts of alleys the title thereto to revert to the person or persons who dedicated the same for alley purposes or their assigns.

Sec. 2. That it shall be the duty of the surveyor of said District, as soon as may be thereafter, to distinctly mark off such alley in the manner in which it may be designated in the petition therefor and make out triplicate plats of such alley showing its courses and boundaries and the quantity in square feet which may be taken from the lots or parts of lots in the square by the opening, extending, widening, or straightening thereof, and showing also the alley or part of alley to be closed, if any, and the lots or parts of lots to which the land contained in such closed alley is to be annexed; one of which plats shall be deposited with the recorder of deeds of said District to be filed among the records of his office, another to be kept in the office of the surveyor of said District, and one filed in the office of the Commissioners of the District of Columbia.

Sec. 3. That in the opening, extension, widening, or straightening of an alley as herein provided for, it shall be lawful for the Commissioners of the District of Columbia to close any alley or part of an alley thereby rendered useless or unnecessary, the fee to which is in the United States, by entering into an agreement with the owners of the lots or parts of lots contiguous thereto for the purchase by them of the land contained in said alley sought to be closed, at a price to be agreed upon by the said Commissioners and the said owners, which price shall not be less per square foot than the assessed value per square foot of the contiguous lots; said agreements to be recorded in duplicate, one of which shall be filed in the office of the recorder of deeds and the other in the office of the Commissioners of the District of Columbia, and the sums so agreed to be paid shall be assessed severally against the lots or parts of lots to which the land so purchased shall be annexed, such assessments to bear interest at the rate of ten per centum per annum until paid, and shall be collected as other taxes are collected: Provided, however, That the Commissioners of the District of Columbia may, in their discretion, sell and convey the land contained in the alley to be closed for cash to any person or persons. That the Commissioners of the District of Columbia may, in the opening, extension, widening, or straightening of an alley, close an alley, or part of an alley, the fee to which is not in the United States, provided the owners of all the lots or parts of lots abutting thereon and the party or parties holding the fee title to the land contained in the alley to be closed shall first sign and file a petition therefor, in duplicate, together with a plat thereof, in duplicate, as provided by the first section of this act, one copy of which shall be filed with the recorder of deeds and the other in the office of the Commissioners of the District of Columbia.

Sec. 4. That upon the filing of such plat by the surveyor in the office of the Commissioners of the District of Columbia as aforesaid, the said Commissioners shall make an application in writing to the marshal of the District of Columbia

to summon and empanel a jury of twelve citizens who have no interest in the real estate mentioned in the said petition (and it is hereby made his duty to summon and empanel the same in all such cases upon application to him in writing by said Commissioners), and who, having first taken and subscribed an oath in writing to discharge the duty imposed upon them by the provisions of this act justly and impartially, shall proceed to ascertain and appraise the damages which may accrue to the real estate of any person or persons by the opening, extending, widening, or straightening of such alley, which shall be the value of the land at the time of the taking, and they shall make and file a statement in writing, signed by them, of the damages so ascertained and appraised, in the office of the Commissioners of the District of Columbia, and duplicate of said statement in the office of the recorder of deeds for the said District, and the amount thereof shall be paid to the persons respectively entitled thereto by said District of Columbia, out of any funds available therefor; and all such alleys or extensions, widenings, or straightenings shall hereafter be kept open and free for public use.

Sec. 5. That the said jury shall apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid, including six dollars for the service of said marshal and sixty dollars for the services of said jury, according as each lot or part of lot of land in such square may be benefited by the opening, widening, extending, or straightening such alley: Provided, however, That in cases provided for in section 2 of this act the sums paid or agreed to be paid for the land contained in an alley or part of alley to be closed, shall first be deducted from the amount of benefits so to be assessed; and they shall make due return of such apportionment to the recorder of deeds and to the Commissioners of the District of Columbia, in which they shall designate each lot or part of lot of land in such square so benefited, and the amount so apportioned to each, respectively; and, in case of failure to pay the amount so apportioned, it shall be the duty of the collector of taxes

to levy a tax upon each lot or part of lot of land, in accordance with such apportionment, and to collect the same as other taxes upon real estate are collected; and said assessment shall bear interest at the rate of ten per centum per annum until paid.

Sec. 6. That the said marshal shall give or cause to be given at least ten days written or printed notice of the time and place of the meeting of such jurrors for the purposes aforesaid to each proprietor of land in the square designated as the location of such alley. If the proprietor be a resident of the District of Columbia the notice shall be served by delivering a copy thereof to him or her personally, or leaving it at the usual residence with some person over ten years of age. If the proprietor be a nonresident the notice shall be served by delivering a copy thereof to his or their tenant or agent, or depositing it in the post-office at Washington City, enclosed in a post-paid envelope, which shall be addressed to the proprietor at his or her post-office address. If the proprietor or proprietors be under twenty-one years of age the notice shall be served as hereinbefore provided upon the guardian or parent of such minor or minors. A return of such service and the manner thereof shall be made by the marshal to the Commissioners of the District of Columbia, and shall be filed among the records of said District.

Sec. 7. That all alleys opened or extended in the city of Washington since June thirtieth, eighteen hundred and seventy-one, under an ordinance of the late corporation of Washington, approved November fourth, eighteen hundred and fourty-two, are hereby made valid: Provided, That nothing in this act shall affect the rights of parties to suits now pending in such cases.

Sec. 8. That all alleys or parts of alleys hereinbefore closed by subdivision, with the approval of the Commissioners, shall remain unaffected by this bill.

Sec. 9. If any moneys from the sale of land in which the United States is interested shall remain after carrying out the provisions of the preceding sections of this act,

such moneys shall be paid into the Treasury of the United States, by the Commissioners of the District of Columbia.

Sec. 10. That all acts and parts of acts inconsistent with the provisions hereof are hereby repealed."

(27 Stat. 255.) Approved July 22, 1892.

The amendatory act of August 24, 1894, reads as follows (28 Stat. 501):

Be it enacted, &c. "That the act of Congress approved July twenty-second, eighteen hundred and ninety-two, entitled 'An Act to provide for the opening of alleys in the District of Columbia,' be and the same is hereby, amended so as to authorize the Commissioners of the District of Columbia, under the terms and conditions of said act in regard to the opening, extending, widening or straightening of alleys, to open minor, streets in said District of a width not less than forty feet, nor more than sixty feet, to run through a square from one street to another, whenever in the judgment of said Commissioners the public interests require it.

Sec. 2. That the words, "one copy of which (plat) shall be filed with the recorder of deeds and the other in the office of the Commissioners of the District of Columbia," in section three of said act be, and the same is hereby amended to as to read "one copy of said plat shall be filed and recorded in the office of the surveyor of the District of Columbia, one in the office of the recorder of deeds of the District of Columbia, and one in the office of the Commissioners of said District."

Sec. 3. That the words "six dollars for the services of said marshal," in section five of said act be, and the same are hereby, amended so as to read, "five dollars per diem for the service of the said marshal when actually employed."

It will be noticed that the Act of 1892 applies in terms to alleys only, which may be opened, &c., under three conditions, *i. e.* 1. When the owners of more than half of the

real in the square make application. 2. When the Commissioners shall certify that the preservation of peace, good order, and public morals require that such alley be opened. 3. When the Health Officer shall certify that such opening, &c., is necessary for the public health.

In the Act of 1894, from which alone the Commissioners acquire authority to open minor streets, such streets may be opened "whenever in the judgment of said Commissioners the public interests require it."

The District made return referring to two other cases filed in the Circuit Court, which disclosed the proceedings, or so much of them as pertain to the discussion of the questions raised here, which were taken in the opening of said minor street.

ARGUMENT.

I. The Constitutionaity of the Act.

a. The validity of the law is attacked on the ground that Congress has by a *general* law provided that the taxing district in the case of opening minor streets and alleys, shall be the square in which the street or alley is opened or widened, as the case may be. This would seem to the average mind to be the fairest method of assessment; for it would be difficult to perceive in what manner owners of property in other squares, unless contiguous, would be benefited by the opening of a street or alley not contiguous to their property, in any other way than the general public is benefited.

The argument for the plaintiff-in-error proceeds upon the theory that the jury is absolutely required to assess benefits against all the lots in the square. There is no such requirement in the law. The amount of the damages and costs are apportioned only as the lots "may be benefited." The only limitation upon the jury was that it should not go beyond the square to assess benefits.

It is not contended, nor could it be reasonably urged, that all the various acts, and they are numerous, passed by Congress to open minor streets and alleys and providing that the costs and damages accruing be assessed back upon the property in the particular squares mentioned, are invalid and unconstitutional; but because Congress has provided this same thing by a *general* law, the law therefore, is unconstitutional. The argument is that Congress has not considered in this particular instance what area will be specially benefited, and can not say, therefore, generally what area will be benefited. The proposition, then, is reduced to this,—Congress cannot, legally, consider the similarity of several situations and legislate for them together as a whole, but must deal with each piece of land separately. In the present case Congress unquestionably had in mind the similarity in benefits and damages that would arise in the various squares by the opening of minor streets and alleys. Substantially the same provisions, in this respect, have been reenacted by the Act of February 23, 1905, amending sections 1608 *et. seq.* of the Code.

A determination by Congress or by the legislature of a State of the area to be benefited by certain improvements, and the assessment to be laid upon that area, is properly within the function of Congress or the legislature, and cannot be disputed at this late day.

Land may be taken for a highway and the cost of the improvement assessed against the property benefited.

Shoemaker *vs.* U. S., 147 U. S., 283.
Bauman *vs.* Rose, 167 U. S., 548.

"Neither can it be doubted that, if the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered benefited by a proposed improvement."

Williams *vs.* Eggleston, 170 U. S., 304, 311.

In Parsons *vs.* District of Columbia, 170 U. S. 45, the Supreme Court upheld a tax laid at an arbitrary rate, where the act determined the *area* to be benefited, and determined the *benefit* to be at a specified rate, *i. e.*, $1.25 per front foot. In this case the court cites with approval the following passage from 2 Dillon, 4th ed. sec. 752:

"Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter made, whether the assessment shall be upon all the property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency."

The only case cited by the plaintiff-in-error to maintain his somewhat novel position is that of Norwood *vs.* Baker, 172 U. S. 269. It is now the generally accepted view that that case stands alone upon the peculiar facts disclosed therein, and is not to be broadly cited as laying down any new doctrine for the application of special assessment principles. The Court of Appeals in attempting to follow that decision, declared a great part of the Act for the street extensions to be unconstitutional, and that decision was reversed here, thus showing that this Court did not intend to enunciate any new principle in the law relating to special assessments. See Wight *vs.* Davidson, 181 U. S. 900. This last case, sustaining the street extension act, which, by the way contains a very analagous provision to the one under discussion in that it provided generally what property should be assessed for the opening and extension of new streets without making any particular provision for specified areas, contains a very interesting review of the various acts relating to special improvements.

It seems to us that this Court has already, and repeatedly, decided the principle involved in this case, in the various

cases upholding the validity of the laws of different States applicable to irrigation districts.

Hager *vs.* Reclamation District No. 108, 111 U. S. 701.

"It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarial districts, and of levees to prevent inundations, as well as for the openings of streets in cities and of roads in the country."

* * * * * * *

"The fact that the lands may be situated in more than one county, cannot affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate.

* * * * * * *

"The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charge shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable." If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. * * * Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. County of Mobile *vs.* Kimball, 102 U. S. 691, 704. The rule of equality and uniformity prescribed in cases of taxation for State and county purposes, does not require that all property, or all persons in a county or

district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in Louisiana *v.* Pillsbury, 105 U. S. 278, 295, there would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that he who reaps the benefit should bear the burden, must in such cases be applied." Pages 704, 705.

"When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State especially and immediately benefited by the expenditure." 703-4.

County of Mobile *v.* Alabama, 102 U. S. 691.

"It is impossible to apply to the varying wants of a municipality the rule invoked with reference to State taxation for State purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied. The same construction of a similar clause in the constitution of other States has been adopted by their highest courts. The Constitution of Virginia of 1850 prescribed that 'taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law;' and the Court of Appeals of the State held that the provision related solely to taxation for purposes of State revenue, and did not apply to taxes by counties and corporations for local purposes. Gilkeson *v.* The Frederick Jus-

tices, 13 Grat. (Va.) 577. The Constitution of Arkansas of 1836 provided that 'all property subject to taxation shall be taxed according to its values,—that value to be ascertained in such manner as the General Assembly shall direct,—making the same equal and uniform throughout the State;" and the Supreme Court of the State held that the provision was intended to apply to State revenue, and was not applicable to taxes levied for county purposes. Washington *v.* The State, 13 Ark. 752. See also McGhee *v.* Mathis, 21 id. 40."

Louisiana *v.* Pillsbury, 105 U. S. 278, 295-6.

The fact the use of water in an irrigation district is limited to the land owners therein, without previously giving every resident in the district a right to share in the use, although any land owner has the right to sell any or all of portion, does not prevent the use from being public.

Fallbrook Irrigation Dist. *v.* Bradly, 164 U. S. 112.

Land which can be beneficially used to a certain extent without irrigation may yet be so much improved by it that it can be properly included in the irrigation district and assessed for the benefits of the artificial irrigation as a public improvement. Idem.

"In the matter of sewers there is a natural beneficial district, to wit, the territory drained, and as to such cases the courts have had little difficulty in accepting the conclusiveness of the legislative determination regarding the property benefited."

Judson on Taxation, sec. 371.
Gillette *v.* City of Denver, 21 Fed. Rep. 822.
Paulsen *v.* Portland, 149 U. S. 30.

In Mattingly *v.* District of Columbia, 97 U. S. 687, it was said:

"It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special

road or street improvements very often are oppressive. But that the legislative power may authorize them and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property at its discretion, is, under the decisions, no longer an open question."

Judson on Taxation says:

"The same principle has been applied to the opening, widening and paving of streets and sidewalks. Thus an assessment under the statute of New York making a taxing district of the lands lying within three hundred feet on either side of the street improved was sustained and held valid as to all parcels of land which were included within that district, though some of them did not front upon the street. The court affirmed the judgment of the New York Court of Apeals, which had said in its opinion: 'The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action can not be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason;' and added, at page 355:

"The legislature in the exercise of its power of taxation, has a right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the teritorial district which should be taxed for a local improvement is within the province of legislative discretion. * * * If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

* * * * * * *

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislatures of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners."

The Act of Congress for opening streets in the city of Washington and providing for apportioning for one-half of the cost upon the lands found to be benefited was sustained as not violative of the Fifth Amendment. The court said it was for the legislature and not for the judiciary to determine, whether the expense of a public improvement should be borne by the whole city, or by the district, or by the property immediately benefited. The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be fixed in proportion to the frontage, area, or market value of the lands, or in proportion to the benefits as estimated by the commissioners. It was within the power of Congress to include as benefited all lands lying within the benefited district, and Congress might submit the question of what parcels of land were benefited to the determination of the tribunal intrusted with the authority of making the assessment." (Citing Bauman *v.* Ross, supra.)

Judson on Taxation, sec. 372.

"A Kentucky statute authorized the city government of Louisville to open and improve streets at the exclusive cost of the owners of lots in each one-fourth of a square, to be equally apportioned by the council according to the number of square feet owned by them respectively, except that

corner lots of prescribed dimensions paid twenty-five per cent. more than others, each subdivision of territory bounded on all sides by principal streets being deemed a square. This statute has been sustained by the Kentucky Court of Appeals (Preston *v.* Roberts, 12 Bush. 57; Peck *v.* Obst, 12 Bush, 268; Broadway Baptist Church *v.* McAlee, 8 Bush, 508) and its judgment was affirmed on motion by the Supreme Court, (Watson *v.* Nevin, 128 U. S. 578) as the contention had been pressed upon them before and determined adversely, so that there was no necessity for its being argued."

Judson on Taxation, sec. 373.

Welty says:

Sec. 308.

"It becomes a question sometimes whether a contemplated improvement within a municipal corporation in nearly equal proportions of a benefit to the public and a special benefit to the property of a local district, ought to be a public charge, or be made at the expense of the property specially benefited. When such a state of facts exist, it becomes a matter of discretion in the governing power of the municipality to determine whether the property benefited shall bear the expense or whether the cost of the improvement shall be made a public charge, and this discretion when exercised is not the subject of review by the courts.

Section 309. EXERCISE OF THE DISCRETION; RESUMPTION OF BENEFITS.—Where the question whether the improvements contemplated shall be made at the expense of the property to be benefited, or be paid for by general taxation, is delegated for determination to the discretion of municipal authority, and this discretion has been exercised by directing the expense to be borne by the property benefited, no other formal finding than such action is necessary to establish the fact that the property to be assessed will be benefited to an amount equal to the expense

of the contemplated improvement or to some portion thereof. The exercise by a municipal corporation, of the authority when delegated, to condemn property necessary to be taken for an improvement, and to assess, through a tribunal of its own appointment, damages therefore upon the property specially benefited thereby, "is a distinct legislative declaration of the local character of the improvement, and that the lands in the locality thus specially affected by it, may be sufficiently enhanced in value to compensate for the burden of sustaining the whole expense." But an assessment made upon a basis of frontage merely and without regard to benefit or proportionate benefit, may be impeached, notwithstanding the record of the proceedings be regular—in an action or proceeding to enforce the assessment. In the absence, however, of fraud, a dtermination that certain property is benefited, is conclusive."

(Welty on Law of Assessments, Secs. 308-309.)

* * * * * * *

"The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia."

Parsons *vs.* District of Columbia, 170 U. S., 52.
Citing Mattingly *vs.* District of Columbia, 97 U. S., 687.
Gibbons *vs.* District of Columbia, 116 U. S., 404.
Shoemaker *vs.* United States, 147 U. S., 282.
Bauman *vs.* Ross, 167 U. S., 568.

IRREGULARITIES COMPLAINED OF.

1. The plaintiff-in-error complains that it does not affirmatively apear that the owners of more than one-half of the land in the square requested the opening of this minor street; that some of the petitioners signed as trustees, one

as executrix and one as attorney. It does appear affirmatively that these persons described themselves, in the petition for the opening of the said minor street, as owners of property and that they were so carried on the tax rolls of the District of Columbia; and this would imply that they were charged with taxes and paid the same. This makes a prima facie showing of ownership within the purposes of the statute, and in the absence of any averment to the contrary is certainly sufficient. There is no statement on the part of the plaintiff-in-error that these persons so representing themselves to be owners, were not in fact such, unless we except the statement contained in his brief that an executor is not and cannot be the owner of property. Without pausing to discuss this proposition in detail, is it enough to say that executors may, and frequently are, clothed with authority to sell real estate and convey a good title thereto, and are charged with payment of taxes and other burdens upon the property entrusted to their care. If this does not constitute ownership within the meaning of the statutes under discussion, it is difficult to perceive what would. Again, if the Commissioners of the District are compelled to go behind the return of the Assessor, what is their duty in the premises? Must they make, at their peril, a detailed examination of every step in the title and pass upon the construction of wills, deeds, or perhaps decide questions of fact as to adverse possession? If so, the Acts would be so hampered by a multitude of minutiæ that it would be useless to put them into operation, and the proceedings taken thereunder might be defeated at any time by showing that the Commissioners made a mistake upon the matters of law or fact involved in the numerous titles to be scrutinized. It is obvious that it could not have been the intention of Congress of casting any such burden upon those charged with the operation of the law. It submitted that the trustees, executrix, and attorney, who signed as owners of property in the square involved, being in possession and control of the property, being assessed therefor and paying taxes thereon, were "proprietors" within the meaning of the Acts.

It is objected, also, that although the signers to this petition might have been the owners on the date certified to by the assessor, December 23, 1897, yet the proceedings were not ordered until February 1, 1898, (plaintiff's brief, 14, 15) and that there is nothing in the record to show that such signers were, in fact, the owners on the latter date. Certainly there is nothing in the record in this case to disclose that there had been any change in the ownership of the property. There is not even an averment that there had been any change. In the absence of any such averment or showing, the presumption is that there was no such change.

Plaintiff-in-error further claims that there was no finding of ownership by the Commissioners, nor any approval by them of the assessor's certificate. These are merely captious objections; there is nothing in the Acts requiring either.

Moreover, it was not necessary that the owners of more than half the property in the square should petition before a minor street therein could be opened. The Act of 1894, which was in force at the time of these proceedings, expressly authorizes the Commissioners of the District of Columbia to open minor streets "whenever in their judgment the public interests require it." The power exercised by the Commissioners in the present instance, and the application to the marshal of said District to summon and empanel a jury, does not appear to have been based upon the petition of property owners nor to have been taken because such owners made application therefor, but such power and such action may well be referred to the authority conferred by the Act of 1894, above cited, and might, and could, have been taken in the absence of any petition on the part of property owners, and indeed, could have been so taken notwithstanding protests on the part of all or any part of such owners, for the Act specifies no other condition than that the Commissioners shall deem the improvement required by the public interests, in their judgment. That they did deem the improvement necessary is shown by their action in directing the proceedings to be taken; otherwise

the proceedings could not have been had, for they are made sole judges of the necessity for them.

As a matter of practice, the Commissioners of the District upon their own initiative direct the opening of minor streets, alleys, &c., in many instances. In many other cases, they take such action after their attention has been called to the situation desired to be remedied, which is usually done, as in this case, by a petition of the property owners.

2. The plaintiff-in-error also complains that there was no proper notice served upon him. The notice given is found on pages 7 and 8 of the record and was served upon the plaintiff-in-error personally, attested by the certificate of the marshal. Record, p. 8. And the plaintiff-in-error objects that the notice fails to inform him that the jury will assess benefits. The notice contains on its face a reference to the Acts of 1892 and 1894, above set out, under which the proceedings are to be conducted. The jury in this case viewed the square in which the said minor street was to be opened, as appears by the verdict, and sat and heard testimony on the question of damages and benefits. The plaintiff-in-error knew this was to be done, for the law required it; and for aught that appears or is even alleged, he did appear and give his testimony. Certainly, he had his opportunity.

3. The plaintiff-in-error alleges that there was no finding of benefits on the part of the jury called to assess damages and benefits by reason of the opening of this minor street. This is the merest quibble over the wording of the verdict found by the jury. They "apportion the amount of the said damages," and append two schedules to their verdict, one for damages to the property taken for the opening of the minor street, and the other containing the headings "square," "lot," "to whom assessed" and "amount of benefits." The jury did in fact find the benefits assessed and called them by that title, benefits, although it was not so stated in the body of the verdict itself, but only in the schedules so appended to the verdict. The law required the

jury to "apportion" the benefits, and that is exactly what they did. They had no power to lay the tax; only Congress could do that.

e. The next contention of the plaintiff-in-error is that the assessments exceeded the actual benefits and were in excess of the value of the land. This, however, is a disagreement between the land owner and the jury upon a question of fact, and a contention which has been conclusively determined by the verdict of the jury.

The plaintiff-in-error claims that the assessment exceeded the value of the land, and cites the assessment records to prove this. It is well known that the assessments are far below the real value of the property, below that for what it is usually sold even at auction sales. Moreover, the plaintiff leaves out of the argument the difference between these lots, as fronting on an alley and not available for building purposes, and their value as fronting on a street and capable of being used for the erection of dwellings. Congress has expressly provided in some of the acts passed for condemnation purposes that the jury shall assess the damages for the land taken as of the *present* value of the land taken, as in the present law, sec. 4 (Code, sec. 1608-h.), and assess the benefits as of the value of the land *as enhanced* by the opening of the street or alley. It is obvious, in the present case, that the opening of the street more than doubled the value of the property. The figures cited by the plaintiff prove nothing whatever.

The plaintiff-in-error attempts to demonstrate, by the assessed values, not by the market values, what the benefits actually were. The jury, however, were the judges of what benefits were received, and they were bound neither by the assssments of record nor by the estimates of the plaintiff. The apportionment was a matter left to their discretion and it is not to be set aside because the plaintiff thinks he has

been harshly treated. It is a question of judgment and discretion and not one of mathematics.

The Act of 1892, under discussion, contains a provision, section two thereof, that the jury shall ascertain and appraise damages which may accrue to any person for any land "which shall be the value of the land at the time of the taking." The benefits to be assessed are, under section five of the Act, such as accrue from the opening, &c. of the street or alley. Thus, there are two standards to determine the value of the land, i. e., one made before the land is taken, in its then condition, as a standard for the payment of damages; and the second, the value of the land as enhanced by the improvement in contemplation. The computation made by the plaintiff-in-error is made under one standard, the assessed value of the land, which is neither of the standards contemplated by law.

The law now in force, section 1608-h. of the Code of Laws for the District of Columbia, expressly provides for these standards, in clearer terms than they are provided for in the Acts under discussion.

"Sec. 1608-h. That if a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from such opening, extension, widening, or straightening, but such benefits shall be considered in determining what assessment shall be made on or against such part of such piece or parcel of land as may not be taken as hereinbefore provided."

The law now provides that benefits may be assessed not only on the lots in the square through which the minor street or alley runs, but also on the lots in the "squares or blocks confronting the square in which such alley or minor street is to be opened," &c. Sec. 1608-j. Code D. C.

Finally, the plaintiff cites cases in which the operation of the law would work great hardship, as in the case of a valuable building to be removed before a street could be cut through, the value of which would have to be assessed against the owners in that square. We cannot answer this better than by citing a remark of Justice Miller, in the case of U. S. *vs.* Lee, 106 U. S. 196:

"Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the right of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fall."

Respectfully submitted,

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